United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7228

To be argued by
HENRY L. BAYLES

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In The

United States Court of Appeals

For The Second Circuit

CALLMAN GOTTESMAN and PAUL J. PEYSER,
Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORPORATION and E. I. du PONT de NEMOURS & COMPANY,
Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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APPELLANTS' REPLY BRIEF

In this brief appellants will first respond to the contentions of General Motors and then (*infra,* p. 18) to those of du Pont and then (*infra,* p. 23) to appellees' answer to our Point III.

APPELLANTS' REPLY TO GENERAL MOTORS

A. Statement of Facts

In plaintiffs' moving affidavits (A49a *et seq,* A107a *et seq.*) and in their brief on appeal (p. 7 *et seq.),* there have been set forth the facts upon which their application is based. These facts were not disputed in any material respect before the District Court. Defendants there, relying upon statements of law (A76a, A88a) claimed that under the authorities, plaintiffs' application for payment of reasonable counsel fees and reimbursement of their $345,059.94 expenses should, in all respects, be denied.

In its brief upon this appeal, General Motors' Statement of the Case (p. 2) is superficial and omits significant matters.

Both General Motors (p. 2) and du Pont (p. 2) have asserted that the Supreme Court simply decided that du Pont's "ownership" of General Motors stock constituted a violation of the anti-trust law. However, it is obvious from a reading of the Supreme Court decisions and the decision of this Court (Main Brief, p. 26), that the Supreme Court found much more than that, including the following:

(1) The 23% stock ownership by du Pont of General Motors stock constituted a controlling interest of General Motors and that this controlling interest, the Court held, was even more potent in 1957 when the Supreme Court reversal occurred (Main Brief, p. 4; 279 F.Supp. at 368; 353 U.S. at 607 note 36 and p. 610).

(2) Du Pont, for a long period of time, had illegally used its controlling interest to promote its sales of automotive products to General Motors, and in that connection, as the dissenting opinion pointed out (353 U.S. at 610), the Court, in fact reversed many of the findings of the Chicago District Court (Main Brief, p. 8; 414 F.2d 956, 959-962; 310 F.Supp. at pp. 1259, 1260).

(3) Upon the second appeal, the Supreme Court in again reversing and ordering divestiture, stated (336 U.S. at 331) that if du Pont's control were permitted to continue it would "induce General Motors to favor du Pont, *the very result which we found illegal on the first appeal*" (italics added).

General Motors still persists in claiming (p. 13) that the Supreme Court "quarreled, not with the District Court's finding of '30 years of non-restraint' . . .". We have shown that the reverse is true (Main Brief, p. 26).

Even after the Supreme Court reversal both defendants attempted to have the District Court's original findings of non-restraint by du Pont remain in effect.

In reversing and making its various findings of restraint by du Pont, the Supreme Court held that since its holding of a Clayton §7 violation by du Pont "sufficed to dispose of the case" it specifically stated that it did not decide "whether du Pont has also violated the Sherman Act" (366 U.S. at 319 note 1 and 353 U.S. at 588 note 5).

In our Main Brief we showed at some length (pp. 10-13) that defendants' efforts after the reversal failed to keep in effect the original non-restraint finding and that the District Court finally *vacated* its original dismissal pertaining to the Government's Sherman Act claims. Neither defendant has made any comment with respect to this.

In its statement General Motors does not refer to the fact that when *Gottesman* was instituted in 1957, shortly after the Supreme Court reversal, du Pont still held its powerful control over General Motors; it still had its nominees upon the General Motors Board and important committees.

General Motors also does not refer to the fact that in *Gottesman* this Court stated (268 F.2d 194) that the decision of the Supreme Court was bound to result in the institution of this derivative suit either by plaintiffs or other fiduciaries (198); that the illegal actions alleged could "in no way be ratified or rectified," (197); and that this suit seeking recovery against du Pont on behalf of General Motors should not be stopped (197) but should be continued and that the "issues be promptly faced and finally adjudicated." (198).

General Motors' statement also does not refer to the fact, pointed out by this Court (Main Brief, pp. 5, 6) that the Government case did not involve any issue as to whether General Motors had been damaged by du Pont's actions and that issue of damage had to be determined in *Gottesman* (Main Brief, pp. 5, 6).

General Motors also does not discuss the fact that almost from the beginning, the preparation and trial of *Gottesman* only involved the issues whether du Pont's actions in its sales of automotive products had damaged General Motors either as a result of the anti-trust violation or breach of its common law fiduciary obligation (Main Brief, pp. 4, 5).

Further, we have alleged in our moving papers and set forth in our brief (pp. 24, 25) that at no time since the decision of the Supreme Court either prior or subsequent to divestiture, did General Motors conduct any investigation as to whether it had been damaged by du Pont's actions which had been held illegal. We further pointed out that in any event, at no time prior or subsequent to the filing of *Gottesman,* did General Motors *advise* its stockholders, plaintiffs or plaintiffs' counsel that it had itself, or by outside independent means, conducted such an investigation or reported its findings.

In the face of the Supreme Court's broad and precedent-making decisions and the possibility of an enormous recovery against du Pont, General Motors' failure to conduct such an investigation and report the findings and its failure to protect the interests of its stockholders and keep them fully informed would, itself, have been proper ground for stockholder attack against it.

Without such an investigation, the stockholders of General Motors, obviously, would have no way of knowing whether damages, which the District Court recognized could run into staggering sums "overshadowing any recovery ever received in the history of this country" (Main Brief, p. 3), had been sustained by their corporation. It would be unthinkable to permit General Motors to close its eyes to such a huge claim against du Pont, to do notning and let the statute of limitations run.

In answer to our criticism, General Motors tenders the following explanation (Brief, pp. 7, 8):

> "This action [*Gottesman*] came on the heels of the government case which had itself caused the Corporation considerable effort and expense, and in the course of which the Corporation thoroughly investigated the circumstances of duPont's relationship with General Motors and had concluded that there was *no basis for a civil action against duPont.*" (italics added).

This "investigation" by General Motors prior to the initial dismissal of the Government suit in Chicago made at a time when General Motors was completely under the control of du Pont, it is submitted, was of little or no value. General Motors' statement with respect to the "civil action against du Pont" obviously referred to the Government civil anti-trust case which, as noted, did not involve any issue as to damage to General Motors, and it is not claimed by General Motors that its investigation then did involve any such question.

Furthermore, the alleged investigation was made prior to the time when the Supreme Court in reversing squarely rejected General Motors' conclusion "that there was no basis for a civil action against du Pont" under the anti-trust law.

If, however, by the above explanation General Motors seeks to convey the impression that before the Supreme Court reversal, it had conducted some investigation as to whether it had a claim for damages against du Pont in a civil action, General Motors certainly failed in its duty in not so advising its stockholders, the plaintiffs or their counsel, and in not reporting the results thereof. It is significant to note that at no time *after* the Supreme Court reversal, has General Motors claimed it had any investigation made as to damages; it certainly never reported the results of any such investigation.

There is no question that the stockholders of General Motors were clearly entitled to a thorough investigation and a

determination, made openly, independently and impartially, as to whether their corporation had been damaged over the many years by the illegal actions of du Pont. its controlling stockholder.

General Motors cannot blame plaintiffs for its expenses in the Government case as well as in *Gottesman.* The position it took in the Government case — that du Pont had not violated the anti-trust law — was proven to be wrong. In *Gottesman,* if General Motors had supplied data and information voluntarily to the plaintiffs and cooperated with them so that all the facts could be ascertained as to whether it had a damage claim against du Pont, *Gottesman* certainly would not have been prolonged for the twenty-year period and the plaintiffs would not have been required to bear $345,059.94 as expenses in the prosecution of this suit. Nor would General Motors itself had been required to incur the expenses it did or tie up its manpower for such a long period of time.

As we have shown (Main Brief, p. 25), after the first reversal, the Chicage District Court appointed *amici curiae* for General Motors and du Pont to protect the respective interests of the stockholders, in connection with divestiture and ordered them to "conduct the necessary investigation in order to report to the Court" (177 F. Supp. at 6). Obviously, both du Pont and General Motors cooperated with this investigation. Yet, although in *Gottesman* the District Court approved General Counsel and this Court approved the institution of this derivative suit, General Motors made no pretense of cooperating so that the full facts could and would be expeditiously disclosed and relevant records preserved.

If General Motors after the Supreme Court reversal had taken prompt steps to insure the preservation of all relevant records of General Motors and du Pont pertaining to the question as to whether General Motors had been damaged, then plaintiffs would not have been "severely hampered by their

inability to obtain from defendants certain data and records, some of which, it was claimed, had been lost or destroyed" (A69a). This has not been denied.

General Motors has only itself to blame for the position in which it finds itself. As we pointed out in the Main Brief (p. 39) what the final result might have been is uncertain if General Motors had cooperated and had promptly made a full and voluntary disclosure to plaintiffs and their counsel, but one thing is clear — there would have been no necessity for some twenty-years of litigation.

B. Answering Point I

Our application that plaintiffs' counsel fees and expenses be paid by General Motors is not predicated upon §4 of the Clayton Act but is rooted in the inherent equitable powers and jurisdiction of the federal courts. Further, in diversity cases, federal courts will look to the applicable state law to determine whether an award of counsel fees in derivative suits should be granted (*Alyeska Pipe Line Co. v. Wilderness Society,* 421 U.S. 240 at 259, note 31).

In *Gottesman,* the ninth cause of action seeking an accounting against du Pont as fiduciary, which includes its illegal actions under the anti-trust law, is a diversity claim which the District Court held was governed by the law of Delaware or New York (279 F. Supp. 361 at 383; *see also Hausman v. Buckley,* 299 F.2d 696 (C.A. 2, 1962)).

Although the "American Rule" does not generally permit an award of counsel fees in an action, the Supreme Court has repeatedly recognized that the federal courts, "in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require" and that the federal courts "do not hesitate to exercise this inherent equitable power whenever

'overriding considerations indicate the need for such a recovery' . . ." (Main Brief, p. 23).

Accordingly, such awards have been made in stockholders' derivative suits or class actions instituted in good faith and for probable cause when the actions in some manner benefited a specific group or the suit itself vindicated a statutory policy.

Both General Motors as well as du Pont in seeking to defeat any award to plaintiffs have relied heavily upon the Supreme Court decision in *Alyeska, supra.* However, as noted in our Main Brief (pp. 36, 37), that action did not involve either a derivative suit or class action. Further, in that action both the majority and minority opinions specifically recognized the continuing existence of the broad equitable jurisdiction of the courts to grant awards in derivative suits and sustained the continuing vitality of the doctrines laid down in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (see Main Brief, p. 37).

Subsequent to *Alyeska*, this Court as well as other circuits, have recognized and applied *Mills* and granted awards where there was benefit to stockholders or where the action vindicated some statutory policy (*Kopet v. Esquire Realty*, 523 F.2d 1005 (C.A. 2, 1975) (Main Brief, p. 36); *Brennan v. United Steelworkers of America*, 554 F.2d 586, 600 (C.A. 3, 1977); *Usery v. Local U. No. 639*, 543 F.2d 369, 381-83 (D.C. 1976).

C. Answering Point II

General Motors takes the position that since du Pont was not compelled to pay General Motors anything after trial, *Gottesman* conferred no benefit at all upon the General Motors stockholders. This is not determinative for in *Mills*, the Supreme Court granted an award in a derivative action where the benefit conferred was not pecuniary. (See discussion Main Brief, pp. 30-32.)

in *Mills* (396 U.S. 375, 395, footnote 22), the Court cited with approval a series of lower court cases involving various types of benefit where applications for awards had been granted and where there had been no pecuniary recovery. Among the cases cited were *Saks v. Gamble*, 154 A.2d 767 (Del. Ch. 1958) and *Abrams v. Textile Realty Corp.*, 197 Misc. 25 (Sup. Ct. N.Y. 1949).

As we have noted, in determining whether the resolution of diversity claims in *Gottesman* benefited General Motors stockholders, the law of Delaware or New York is applicable.

The various authorities we have cited under our Point I support our position that the General Motors stockholders were benefited[1] and, accordingly, that the reasonable expenses of *Gottesman* should be borne by all stockholders (*i.e.*, payment by General Motors) and that plaintiffs should not be saddled with the entire expense.

The *Saks* case (Main Brief, pp. 28-30), is in point and its cursory rejection by General Motors (p. 14) we submit is not valid. In granting an award of counsel fees, *Saks* held that plaintiff was not unreasonable in instituting the derivative action to obtain a determination; that the corporation had engaged in conduct which justified the action; and that even though the action was dismissed, it was only as a result of plaintiff's action that "for the first time the matter has been removed from the area of possible substantial doubt. *This is a benefit to the corporation*" (italics added).

It is submitted that the same is true in the instant case. The disclosure by du Pont obtained only after trial in a compulsory

1. It is submitted that plaintiffs would have been entitled to have applied for and obtained interim awards after they had sustained their right to institute the action (268 F.2d 194; Main Brief, pp. 9, 10, 27, 28) as well as after the reversal and remand by this Court (414 F.2d 956; Main Brief, pp. 19, 20; A112a).

accounting — as to whether General Motors was damaged by its actions — was a matter which General Motors itself for the benefit of its stockholders, ought to have undertaken and secured a determination before some impartial tribunal and it ought to have borne the expenses in connection therewith even though du Pont would ultimately be liable therefor. (See Main Brief, p. 40 *et seq.; infra* pp. 23 *et seq.)*

In any event, whatever the reason for its failure to act, the investigation by *Gottesman* was necessary and justified and resulted in benefit to General Motors stockholders for by compelling du Pont to account, the question was resolved whether du Pont had injured General Motors and that issue was thereby removed, as in *Saks,* "from the area of possible substantial doubt."

General Motors seeks (p. 15) to differentiate *Voege* (Main Brief, p. 32) but its differentiation is not valid. In *Voege,* the Court in granting the award of counsel fees stated that "the benefit to the defendant corporation from the settlement which I approved in my Memorandum and Order dated December 23, 1975 is, at best, limited to 'corporate therapeutics' . . .".

The attempted distinction by General Motors (pp. 14-16) of *Becker, Chermerinsky, Allen* and *Fishman* cited by us (Main Brief, pp. 32, 33) upon the ground that the award of counsel fees was not opposed, it is submitted, is not valid, for notwithstanding, the court was still required to find that the action conferred a benefit upon the corporation on whose account plaintiffs had acted.

The *Perrine* case, a decision by Judge Seitz, cited by General Motors (p. 11) is not in conflict with *Saks v. Gamble,* a decision by the same judge rendered eleven years later. In *Perrine* it appeared that the counsel who were seeking the award had not represented the plaintiffs-stockholders in the derivative suit and the only service they performed was to oppose,

unsuccessfully, a proposed settlement; and the court found that these services constituted no benefit to the stockholders upon which an award could be predicated.

General Motors urges (p. 16) that *Kennedy v. Emerald Coal & Coke Co.*, 30 A.2d 269 (Del.Ch. 1943) cited by us (Main Brief, p. 33) is not applicable, for it involved costs. However, as noted by the Court in *Wilmington Trust Co. v. Coulter*, 208 A.2d 677 at 681 (Del. Ch. 1965): "Our Supreme Court has said that the jurisdiction of equity to award counsel fees as costs in a proper case is undoubted."

In our Main Brief we also urge that under analogous principles involving trusts and decedents' estates our application should be granted and we have cited *Schenectady Trust Co.; Matter of Osborne and Matter of Heller* (Main Brief, pp. 33, 34).

General Motors seeks (p. 16) to differentiate these cases claiming that they are "based on statutory authority contained in the New York Civil Practice Act §1513" and therefore not applicable.

Even if these cases were based upon statute, they would still be relevant for they constitute New York law which is applicable in this diversity case. Further, the attempted distinction is not valid.

In *Legal Therapeutics: "The 'Salvage' Factor in Counsel Fees Awards,"* 69 Harvard Law Review 658 (1956), Professor Hornstein writes (p. 676):

> "No one, strangely enough, has ever heretofore called attention to the close — almost complete — parallel between a shareholder's derivative suit and one by a residuary legatee on behalf of an estate where appointed fiduciaries neglected to

> perform their duty. In the estate cases where the attorney for a residuary legatee has performed services which confer a substantial benefit on the estate as a whole, he is awarded counsel fees based upon such benefit and the fee is charged against the general estate, not upon the distributive interest of the person on whose behalf he primarily acted."

In footnote 88 on the same page of the article, the following appears:

> "The power of the surrogate to make such awards does not, the writer believes, require statutory recognition. In New York, the surrogate's power is confirmed by N.Y. Surr. Ct. Act §231-a."

In *Schenectady*, the court made it clear that the statutory authorization (C.P.A. §1513) was only a *further* ground for the grant of counsel fees (263 App. Div. at 544) while in *Matter of Heller*, the court, agreeing with Prof. Hornstein, stated (10 Misc. 2d at 366):

> "There is direct statutory provision for an allowance of counsel fees to attorneys for the trustees of an express trust. (Civ. Prac. Act §1548, subd. 8.) There is no statutory enactment empowering the court to grant allowances to counsel appearing for parties other than the trustee in an accounting action or proceeding. Such power however, has been held to exist and to be properly exercisable to compensate attorneys who have been of assistance to the court in determining questions of construction, even though the position which they asserted was not adopted by the court. (*Schenectady Trust Co. v. Emmons*, 263 App. Div. 542, 543-544)."

In *Matter of Tyrrel*, 46 A.D. 2d 643 (1st Dept. 1974), it appeared that although objections filed in a trust accounting were rejected, the court ruled that their filing was justified and that the objectant's expenses should be charged against the trust corpus, stating:

> "A prima facie showing was made of conflict of interest in the trustee sufficient to require an explanation by him. We therefore believe that the matter should be remanded in order that these issues be explored. Additionally, considering all the circumstances, it was improper to charge fees and costs to the deceased trustee's estate and such amounts should be charged to the trust corpus."

In 90 C.J.S. §420, p. 816, the following appears:

> "Generally, an allowance to interested parties in the accounting proceeding, other than the trustee, for counsel fees and like expenses, is a matter resting within the jurisdiction of the court. So the court in its discretion, may make such an allowance *where the parties have been of assistance to the court* in determining questions relating to the disposition and distribution of the trust estate or where they have been successful in contesting the trustee's account or *in compelling him to account*; . . . " (italics added).

Fundamental trust principles likewise justify the granting of our application. We have cited in our Main Brief (p. 43) 3 Scott on Trusts (*The Law of Trusts*, 3rd Ed.), §188.4. That section contains the following (pp. 1533, 1534):

> "The trustee owes a duty to the beneficiaries to take reasonable steps to realize on claims he holds in trust. . . . Where the trustee properly

> brings or defends a proceeding for the benefit of the trust estate, he is justified in incurring such expenses as are reasonable for the purpose, including the expense of employing an attorney. *Even though the trustee is unsuccessful in the litigation, he is entitled to charge the estate with the necessary expenses if he was not himself at fault in causing the litigation.*" (italics added).

It is submitted that the foregoing principle is equally applicable to the ninth cause of action. In *Gottesman* this Court approved (268 F.2d 194) the institution of the derivative suit by plaintiffs as "self-appointed fiduciaries" or trustees and authorized them to seek to recover from du Pont on behalf of the trust estate (General Motors) what could have been a huge sum.

Since *Gottesman* was instituted in good faith and upon reasonable grounds, the fact that no damages were ultimately obtained from du Pont should not bar plaintiffs under the above trust principle, from recovering their reasonable fees and expenses from General Motors.

It may finally be noted and it is not denied that in answer to the notice of hearing, no stockholder of General Motors filed any opposition to the request by plaintiffs for payment by General Motors of their reasonable counsel fees and expenses or filed anything indicating approval of the decision of General Motors' management to oppose payment (Main Brief, p. 2).

We respectfully submit that *Gottesman* did confer substantial benefit upon all of the General Motors stockholders and, under the authorities, that the fees and expenses should be apportioned among all stockholders by requiring General Motors to make payment.

D. Answering Point III

After *Alyeska*, this Court in *Kopet*, in reversing, reaffirmed the *Mills* doctrine that the vindication of a statutory policy was still an important factor in the determination of counsel fee awards in derivative and class suits. (*Cf. Usery v. Local U. No. 639, supra*, at p. 383.)

We submit that the argument we have made in this connection (Main Brief, p. 34 *et seq.*) that *Gottesman* benefited not only General Motors stockholders but also stockholders in general by providing "important means of enforcement" of the anti-trust law and by vindicating the statutory policy, is valid and fully applies to our application.

E. Answering Point IV

In answer to our charges of continuous obdurate conduct and hard adversary position ever since the institution of *Gottesman* (Main Brief, pp. 7-18, 38). General Motors tenders various excuses.

As one excuse General Motors states (pp. 19, 20) that ". . . even though no damages were sought directly from it, General Motors properly felt compelled to defend the action actively to protect its own good name and the good names of its loyal employees."

Even if this were true, it is submitted that it hardly justified its combining with du Pont at the outset in trying to prevent its own stockholders from even having their day in court and from having a right to demand and obtain an accounting from du Pont for its actions over the many years held illegal by the Supreme Court. It also hardly justifies its actions, after being defeated in its initial effort to prevent the stockholder suit, when it joined with du Pont at every step thereafter in attempting to defeat or minimize any recovery which plaintiffs sought to

obtain for General Motors from du Pont. (See Main Brief, pp. 9-16.)

After all, General Motors did have just as high, if not a higher, duty to protect its own stockholders after the Supreme Court decision as it did its own officers and employees.

General Motors calls "disingenuous" (p. 19) our statement that with respect to the preparation and trial of the sole issue as to whether General Motors was damaged in connection with the first and ninth causes of action, there was no claim whatsoever of wrongdoing on the part of General Motors.

In making this criticism, General Motors completely overlooks the statements made not only by plaintiffs, but also statements made by General Motors itself (Main Brief, pp. 4, 5), which support our claim that no wrongdoing was charged in this connection against General Motors.

It should be further noted that the courts themselves indicated that the sole issues presented to them for determination under the first and ninth causes of action were not any question of wrongdoing by General Motors but simply whether General Motors had been injured either by anti-trust violation or by breach of fiduciary obligation as a result of the actions of du Pont (279 F. Supp. at 363; 414 F.2d at 958; 310 F. Supp. at 1258; 436 F.2d at 1207).

General Motors offers as a further excuse for its conduct (p. 20) that in paragraph (e) of the prayer for relief in the *Gottesman* complaint, an injunction was sought against du Pont "which, if granted, could not have failed to affect the purchasing policies and procedures of General Motors."

It is submitted that this excuse is without merit. A simple reference to paragraph (e) of the prayer for relief in the amended consolidated complaint discloses that this request for relief was confined to the thirteenth cause of action, which was not involved at all in the preparation for and trial of the narrow issue of damage contained in the first and ninth causes of action.

Furthermore, several years after *Gottesman* was instituted, and long before the *Gottesman* trial, the Chicago District Court upon remand in the Government case did grant broad injunctive provisions against both du Pont and General Motors with respect to the purchasing policies and procedures of General Motors in the original judgment (177 F. Supp. at 43, 44), as well as in the final judgment (¶ ¶ IV and V) dated March 1, 1962.

As a further excuse for its continued obdurate conduct throughout the entire history of *Gottesman*, General Motors claims (p. 20) that plaintiffs may not raise this matter, since at the trial, plaintiffs' motion to dismiss the entire answer of General Motors had been denied. It is submitted that this excuse is not tenable.

That the District Court at that stage of the proceedings did not sanction the striking out of General Motors' answer to the entire complaint does not estop plaintiffs, it is submitted, from raising the obdurate conduct of General Motors upon the present application. Further, no such issue was raised by General Motors before the District Court in opposing our present application; nor did that Court predicate its determination upon any such ruling in denying this application.

We have stated that the hard adversary position of du Pont is "understandable" (Main Brief, p. 25) for it was the target of the suit and might have been required to pay General Motors an enormous sum.

Du Pont has asserted (A80a, footnote) that it did not act obdurately. In the same footnote it cites *Saks v. Gamble, supra* and *Korn v. Franchard* (Main Brief, p. 38) for the proposition that obdurate and unreasonable conduct "by defendants might warrant an assessment of attorneys' fees in favor of a losing plaintiff."

We respectfully submit that General Motors has failed to submit any valid excuse for its continued obdurate and unreasonable actions in *Gottesman*.

APPELLANTS' REPLY TO DU PONT

Du Pont claims (pp. 5, 6) that plaintiffs "cannot obtain an award against du Pont without legislative authorization." It urges that since plaintiffs did not succeed in obtaining judgment for damages against it on behalf of General Motors, their application was properly denied under §4 of the Clayton Act, and therefore they are not entitled under any principle of law to payment from du Pont of their reasonable counsel fees or expenses.

The simple answer to this is that plaintiffs have not based their application at all upon §4 but we have urged that du Pont (as well as General Motors) is responsible upon wholly different grounds.

Under the ninth cause of action, plaintiffs seek, on behalf of General Motors, an accounting against du Pont by reason of its self-dealing and sales of automotive products to General Motors while it was the controlling stockholder and occupied a fiduciary relationship. Du Pont claims (pp. 6, 7), that it should not be held responsible for plaintiffs' expenses in connection with such accounting, since after trial of this cause of action, du Pont was not required to make any payment.

As we have noted, the findings of the Supreme Court and of this Court were: (1) du Pont by virtue of its large stock interest had the power to control General Motors; (2) du Pont exercised and used that control in effecting sales of automotive products to General Motors; (3) in connection with such sales, du Pont used its control to induce General Motors to favor it which "led to the insulation from free competition" of most of General Motors' market; (4) du Pont's commanding position with

General Motors was promoted by its stock interest and not gained solely on competitive merit; and (5) if this control were to continue, the Supreme Court found it would "induce General Motors *to favor du Pont, the very result which we found illegal on the first appeal. . .*" (italics added — see Main Brief, pp. 8, 19, 26).

It is clear that in making these "illegal" and self-dealing sales to General Motors, du Pont as controlling stockholder occupied a fiduciary relationship vis-a-vis General Motors as the controlled corporation.

The entire thrust of plaintiffs' ninth cause of action was to obtain a compulsory accounting by du Pont in connection with these sales, and, as Judge Metzner pointed out (Main Brief, p. 42), upon such an accounting, it was du Pont's clear burden to come forward and establish the scrupulous fairness of these self-dealing sales.

Thus, this compulsory accounting sought by *Gottesman* was wholly caused by du Pont's actions which the Supreme Court had adjudicated were improper and illegal. Although upon the trial, du Pont was able to sustain its burden of showing fairness, it is submitted it would be inequitable to compel plaintiffs to bear their legal expenses and large disbursements required to obtain such a determination. Plaintiffs' expenses, it is submitted, should not only be charged to General Motors on whose behalf the action was instituted but should also be properly charged to du Pont whose illegal actions caused them.

Du Pont also errs when it claims (p. 7), that the judgment of dismissal demonstrates that "du Pont is at worst in the position of a fiduciary who has been fully cleared of all charges of wrongdoing."

However, du Pont's strong control over General Motors, its exercise of such control and its sales to General Motors, all of

which were found to be part of its anti-trust violation and held illegal by the Supreme Court, remained illegal and were not retroactively cured by the fact that later du Pont was able to obtain a judgment not requiring it to pay damages for its self-dealing.

In a further attempt to show that it should not be considered a self-dealing fiduciary, du Pont again presents (p. 8) incomplete extracts from the opinion of the Supreme Court. In our main brief (p. 41) we discussed these incomplete extracts and showed that when the complete quotations were read, they do not support du Pont's claim.

We have further pointed out that in connection with the liability of a self-dealing fiduciary, the courts have repeatedly stated that it is no defense at all that the fiduciary may have acted in good faith or with the best of intentions or without intent to defraud or without being guilty of mismanagement (see Main Brief, pp. 40, 41). As Judge Metzner stated (Main Brief, p. 42), the sole criterion for determining whether a self-dealing fiduciary is liable, is an objective test, *i.e.,* whether the transactions between the parties were scrupulously fair.

In discussing our authorities (Main Brief, pp. 43, 44) du Pont makes the broad and unqualified contention (p. 7) that where an action had to be instituted against a trustee because of his own fault or misconduct the penalty incurred by the trustee is that he cannot have his own litigation expenses paid out of the trust corpus; and du Pont adds that there is "no suggestion that he [the trustee] must bear the expenses of the challenging party" (citing 3 *Scott on Trusts*) and that the trustee cannot be charged "for attorneys' fees of the excepting party" (citing 90 C.J.S. §420).

However, an examination of our authorities[2] and the

2. Through a printing error, "§809" was omitted in our reference (Main Brief, p. 43) to the citation in Bogert, *Trusts and Trustees*.

authorities cited by du Pont show that its contention is wrong and that the courts have charged counsel fees of the challenging party against the trustee individually.

Our quotation from 3 *Scott* §245, p. 2155 (Brief, p. 43) reads "So also in any case where the litigation results from the misconduct of the trustee, the expense of the litigation must be borne by him." Note 3 to that quotation in *Scott* lists various authorities including *April v. April,* 245 App. Div. 841 [2nd Dept. 1935), not disturbed upon appeal upon this point 272 N.Y. 331, 340] and *Dickerson v. Camden Trust Co.,* 64 A.2d 214, 218, 219 (Sup. Ct. N.J., 1949). In these cases, counsel fees of the challenging party were charged to the trustee personally.

In *Dickerson,* the Court stated that even though the fiduciary acted in good faith (219):

> "still 'the necessity for these expenses arose out of the misconception of the trustee as to its duty . . . and through no fault of the cestui,' and the beneficiaries should not be required to bear the burden of such expenses (citation). These allowances properly must be borne by the executors and trustees individually."

In *April,* the Court said (842):

> "The charge upon the trustee for the expenses of the reference, counsel and accounta..t's fees, etc., was properly imposed as the protracted hearing was rendered necessary by his evasive and shifting theories and obstructive tactics."

Further, our quotation (Main Brief, p. 44) from 90 C.J.S. §420, pp. 818, 819 reads:

> "Similarly, a trustee may be charged with the

> costs and expenses of his accounting where he has rendered necessary the incurring of such costs and expenses by his misconduct or negligence or where on a contested settlement the finding is against him.".

To support this quotation Note 1 cites *April v. April, supra,* and, in the supplement to that Note, *Parker v. Rogerson,* 76 Misc. 2d 705, *aff'd.,* 49 A.D. 2d 689 (4th Dept. 1975). Both of these authorities required the trustee to bear the expenses of the challenging party including counsel fees. In the *Parker* case the Court stated (710):

> "An allowance for counsel fees and disbursements is a matter of the court's discretion where self-dealings of a fiduciary necessitate the proceedings. (*Matter of Hidden,* 243 N.Y. 499; *Matter of Garvin,* 256 N.Y. 518; *Matter of Bausch,* 280 App. Div. 482, *supra; Matter of Rosenbaum,* 115 N.Y.S.2d 450, *supra;* 90 C.J.S. Trusts §420; *Matter of Flood,* 133 Misc. 72; *Matter of Dalsimer,* 251 App. Div. 385, *aff'd,* 277 N.Y. 717)."

One of the authorities in the note from 90 C.J.S. §420, p. 819 relied upon by du Pont is *Liberty Trust Co. v. Plews,* 77 A.2d 219 (Sup. Ct. N.J., 1950). In that case the Court stated that it was compelled to reverse an award of counsel fees in favor of the challenging party against the trustee individually because the enactment of a New Jersey Court Rule prevented it (*cf.* prior case, *Dickerson v. Camden Trust Co., supra*).

However, the charging of the challenging party's counsel fees to the trustee individually is allowed under the applicable law of New York (*Parker v. Rogerson, supra*) as well as Delaware. (*Wilmington Trust Co. v. Coulter, supra,* at p. 682; *Du Pont v. Delaware Trust Co.,* 364 A.2d 157, 162 (Del. Ch.

1975); *In re Carroll's Estate,* 38 A.2d 466, 470 (Del. Ch. 1944); *see also Wolff v. Calla,* 288 F. Supp. 891, 894 (E.D. Penn. 1968; *National Academy of Sciences v. Cambridge Trust Co.,* 346 N.E. 2d 879, 885 (Sup. Ct. Mass. 1976).)

In the instant case, it was the adjudicated wrongdoing and illegal acts of du Pont which required the accounting action. Even though it was not finally required to make any payment to General Motors, it is respectfully submitted that du Pont should be required to bear plaintiffs' reasonable expenses for obtaining such accounting.

IN REPLY TO GENERAL MOTORS POINT V AND DU PONT POINT III

In answer to our Point III, both General Motors (p. 21) and du Pont (p. 8) refuse to pay plaintiffs for the services rendered in connection with their preparation and submission of their final report to the Court. (See A71a *et seq.*)

They urge that the report was not prepared at their request but upon plaintiffs' initiative and to enable them to comply with Rule 23.1 FRCP. However, the background of the events leading to the making of this report does not support their contentions.

After the final dismissal of the *Gottesman* claims with respect to automotive products (first and ninth causes of action) du Pont moved for summary judgment dismissing the remaining claims in that suit. Various portions of that motion did not go to the merits but were predicated upon the fact that in *Gottesman,* plaintiffs could not recover any damages accruing prior to May 1950, the earliest date of their stock acquisition (414 F.2d 957, 958 note 2).

As a result, even if du Pont's motion were to have been granted in full, there would be still left open for determination a

number of issues in *Schiff*, the companion derivative case which had been stayed pending the termination of *Gottesman* (Main Brief, pp. 14, 15). In *Schiff*, unlike *Gottesman*, plaintiff's General Motors stock acquisition was in 1936; she was therefore in a position to recover far greater damages on behalf of General Motors than *Gottesman* (A63a).

Accordingly, after final dismissal of the first and ninth causes of action in *Gottesman*, a conference[3] was held with the Court on March 23, 1972. At this conference plaintiffs' counsel proposed that it would be advisable there be no further piecemeal determination, that the remaining claims in *Gottesman* be withdrawn without prejudice and the case terminated so that the *Schiff* case could immediately proceed. The transcript discloses that at this conference defendants desired time to consider the proposal.

Thereafter, du Pont, with the acquiescence of General Motors, proposed to plaintiffs' counsel (who were also acting as counsel in *Schiff*) that it would be advisable if both cases were completely terminated and offered to cooperate and supply any data requested by plaintiffs in *Gottesman* and *Schiff* to enable them to submit their final reports to the Court. Defendants indicated that the full facts would disclose that the remaining claims in *Gottesman* and undisposed of claims in *Schiff* had no reasonable prospect of success.

In connection with the submission of the final reports and final disposition of both cases, various conferences were held with the Court. (See letter from Judge Metzner dated September 20, 1976, A106a.)

In accordance with their understanding and proposal, du Pont and General Motors submitted additional data to plaintiffs and after a thorough review of this data and all other available

3. A transcript of this March 23, 1972 conference, docketed on May 31, 1972, will be submitted for this Court's convenience.

material, plaintiffs in both *Gottesman* and *Schiff* finally prepared and submitted their final reports to the Court (A37a *et seq.*, A71a *et seq.*).

It is respectfully submitted that under the circumstances presented, plaintiffs are entitled to be compensated for the services so rendered.

CONCLUSION

Gottesman has indeed been a *sui generis* case. The litigation has spanned some twenty years and has been hard fought at every step. Plaintiffs and their counsel over that period have conscientiously performed their services and expended large sums for necessary expenses. They have done everything possible to protect the interests of General Motors stockholders for whom they were acting as fiduciaries. During the long period, as the Court noted (A121a, note 2), David Brady, plaintiffs' Trial Counsel and other counsel who worked extensively on the case have died (Main Brief, p. 22; A73a, A121a).

Our appeal is certainly not "frivolous" as General Motors states (Brief, p. 1 footnote). The question whether plaintiffs' reasonable counsel fees[4] and expenses should be paid by either or both of the defendants should not be determined by generalities but, as indicated by the Supreme Court (Main Brief, pp. 23, 24), by the peculiar facts and circumstances in a "particular situation." When we review the "overriding considerations" uniquely presented by *Gottesman*, it is respectfully submitted that it would clearly be in "the interests of justice" that plaintiffs' application be granted.

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4. Actually the $1,000,000 requested is a fraction of the fair and reasonable amount of counsel fees for the services rendered by the many attorneys over almost twenty years (A114a). However, our application took into consideration the lack of any monetary recovery.

It is submitted that under the facts and circumstances and under the applicable authorities, plaintiffs, legally and equitably, are entitled to payment of their reasonable counsel fees and to obtain reimbursement for their expenses amounting to $345,059.94.

Accordingly, it is respectfully requested that the order dated April 12, 1977 appealed from be reversed and the matter remanded to the District Court for determination of the amount of plaintiffs' reasonable counsel fees, disbursements and expenses to be paid by General Motors and/or du Pont.

Respectfully submitted,

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RICHARD NETTER
LEO BRADY
ARTHUR B. NETTER
Of Counsel

Dated: December 8, 1977

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

CALLMAN GOTTESMAN Y PAUL PEYSER

Plaintiffs-Appellants

- against -

GEN. MOTORS CORP & E.I DUPONT DE NUMOURS & CO.,

Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Robert L. Martinez, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1165 Morris Avenue; Bronx, New York; 10456 *That on the* 8th *day of* Dec. *1977, dependent served the annexed*

Reply Brief *upon* Covington & Burling, Esqs. *attorney(s) for*

in this action, at 888 Sixteenth Street, N.W.
Washington, D.C.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 8th
day of Dec. *19* 77

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

Robert L. Martinez

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

CALLMAN GOTTESMAN & PAUL PEYSER,
Plaintiffs-Appellants.

- against -

GEN. MOTORS CORP., & E.I. DUPONT DE NUMOURS & CO.,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Reuben A. Shearer, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030.

That on the 8th *day of* Dec. *19* 77 *at* 767 Fifth Avenue
New York, New York

deponent served the annexed *upon*

Re Brief

Edward B Wallace, Esq
John J Higgins, Esq

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 8th
day of C Dec. *19* 77

Reuben A. Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979